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### THE REACTION TOWARD PURE DEMOCRACY.

Not the least dangerous of the forces unloosed by the tremendous upheaval of social and political life caused by the world war is the tendency of the unthinking man to overturn all the institutions of society in the general confusion, and to have "one hell of a big time", as one rough soap box orator expressed it not long ago. And such a time would be "hell" indeed. It is "hell" today in Russia, where a catastrophe worse than war is upon that unhappy land.

It is said, however, that "out of all turmoil and suffering is always born something worth having, and the more ghastly expensive the experience, the more precious the result." We are confident, therefore, that the bitter experience of Russia with Bolshevism will prepare the people of that great country for the blessings of a truly representative and republican form of government.

When will the world ever learn the lesson that the only form of government which is more to be dreaded than an absolute monarchy is an absolute democracy? To people who do not think the term democracy sums up all that is best in human government. The desire of every man, if unrestrained by reflection and experience, is to do as he pleases. He fails to see that this is just what the absolute monarch has set his heart upon. In order for a man to realize this desire he must live far removed from his fellowman; otherwise his effort to effect his own desires will run counter to the will of his neighbor, and a fracas result. In other words, to borrow the suggestive words of Lowell, "Democracy gives every man the right to be his own oppressor."

Usually, however, an absolute democracy is the natural reaction from an absolute monarchy. As a pendulum released from

one extreme must swing to the other extreme before it gradually comes to rest at the place of equilibrium, so those who have endured the chains and stripes of absolutism have a tendency to rush headlong into the wild and bloody orgies of anarchy. For this reason we are not uneasy over the ultimate outcome of the political conditions in Russia and Austria among those people who never yet have tasted real liberty. We have no doubt that in a few years they will soon come to appreciate that "where justice reigns, 'tis freedom to obey."

Thomas Jefferson said that "the republican is the only form of government which is not eternally at open or secret war with the rights of mankind." In this pregnant thought is contained the wisdom of ages of suffering humanity. The representative principle in government, therefore, should be guarded as a priceless inheritance against the encroachments of absolutism, either of a king or a mob.

The greatest danger, however, from mob rule, is not in Russia nor Austria, but in free countries like America. The contagion of democracy is almost resistless and is to be feared as a political pestilence threatening the very life of the State. It is not unlikely that in this country, after the war, demagogic appeals will be made to uproot old institutions, to sweep away essential, constitutional restraints, and enter upon a season of wild legislative experiment.

Already in this country we have had here and there outbreaks of unrestricted democracy in the form of laws providing for the recall of judges and judicial decisions, transferring to the hustings for popular debate the intricate and delicately adjusted theories and principles of law and justice. And even such popular reforms as the direct primary and the initiative and referendum are portentous indications of a tendency toward absolute democracy. The fact that these reforms, which have usually proven unsatisfactory in practice, except where surrounded by restrictions and con-

ditions which guard against the weaknesses inherent in all measures providing for the direct rule of the people, should convince every right-thinking man that the representative principle in government is essential to make democracy a safe form of government for the world.

A period of reconstruction is certain to come after the war. Many changes will be made, most of them for the better, others for the worse. During this critical period lawyers should stand in their places prepared to lead and to advise their countrymen lest they tear up the good with the bad and ignorantly grasp after a rose only to find it a thistle. Above all should we keep before the people the dangers of an absolute democracy and the mirage of so-called popular rule. And those who know how to pray will find appropriate expression for a timely petition in Kipling's *Recessional*:

"If, drunk with sight of power, we loose  
Wild tongues that have not Thee in awe—  
Such boasting as the Gentiles use,  
Or lesser breeds without the Law—  
Lord God of Hosts, be with us yet,  
Lest we forget—lest we forget."

A. H. R.

## NOTES OF IMPORTANT DECISIONS.

**SHIPS AND SHIPPING—LIABILITY OF LUSITANIA OWNERS FOR DEATHS CAUSED BY GERMAN SUBMARINE.**—The world war has raised many new questions and one of these occurs in the recent case of the *Lusitania*, 251 Fed. Rep. 716. The portentous event that hurled the greatest republic in the world into the awful struggle that had for nearly three years been drenching Europe in blood occurred on the 7th day of May, 1915, when a torpedo from a German submarine found its mark on the starboard side of the *Lusitania*. Many lives were lost and suits followed against the Cunard Company, which brings this action to limit its liability to its interest in the vessels should the court find any liability. The court found that the Company was not liable for the deaths resulting and in the course of its opinion gives an interesting account of one of the most dastardly crimes ever committed by a civilized nation.

The court finds as a fact that no explosives were on board the *Lusitania*, the only munitions being some cases of cartridges and blank shells. It also finds that the company was not bound to postpone voyage because of the advertisement of the German embassy, warning passengers on British passenger ships that they sailed in the forbidden waters at their own risk. This court then cites Section 116 of the German Prize Code, which provides:

"Before proceeding to a destruction of the vessel the safety of all persons on board, and, so far as possible, their effects, is to be provided for."

The court in commenting on this provision of the German code which, it declares, is in conformity with international law, says:

"When the *Lusitania* sailed from New York, her owner and master were justified in believing that, whatever else had heretofore happened, this simple, humane, and universally accepted principle would not be violated. Few, at that time, would be likely to construe the warning advertisement as calling attention to more than the perils to be expected from quick disembarkation and the possible rigors of the sea, after the proper safeguarding of the lives of passengers by at least full opportunity to take to the boats.

"It is, of course, easy now, in the light of many later events, added to preceding acts, to look back and say that the Cunard Line and its captain should have known that the German government would authorize or permit so shocking a breach of international law and so foul an offense, not only against an enemy, but as well against peaceful citizens of a then friendly nation. But the unexpected character of the act was best evidenced by the horror which it excited in the minds and hearts of the American people.

"The fault, therefore, must be laid upon those who are responsible for the sinking of the vessel, in the legal as well as moral sense. It is therefore not the Cunard Line, petitioner, which must be held liable for the loss of life and property. The cause of the sinking of the *Lusitania* was the illegal act of the Imperial German government, acting through its instrument, the submarine commander, and violating a cherished and humane rule observed, until this war, by even the bitterest antagonists. As Lord Mersey said:

"The whole blame for the cruel destruction of life in this catastrophe must rest solely with those who plotted and with those who committed the crime."

"But while, in this lawsuit, there may be no recovery, it is not to be doubted that the United States of America and her Allies will well remember the rights of those affected by the sinking of the *Lusitania*, and, when the time shall come, will see to it that reparation shall be made for one of the most indefensible acts of modern times."

**DAMAGES—WHERE HOT WATER IN A STREAM DIVIDES AN ICE FIELD IN TWO PARTS.**—The day of novel cases is not past. New situations still arise to puzzle the courts and no subject of law is more fertile in producing such situations than the subject of Damages. A recent case in point is that of Sandusky-Portland Cement Co. v. Dixon Pure Ice Company, 251 Fed. Rep., 506. This was a suit by the ice company to recover damages from the cement company for draining hot water in a stream during the ice season and injuring plaintiff's (appellee's) ice field located further down on the same stream.

It appeared that the hot water flowed through the channel of the river and affected a portion of the river only a few yards wide but sufficient, in the ice season, to separate appellee's ice field in two parts so that he could not pass over the channel of the river to reach the ice fields on the other side.

The court was puzzled over the proper rule of damages. It appeared that there were 125,000 tons of ice on an average to be secured on the field each season, and appellee suggested that the rule of damages was the total ice tonnage less the amount actually harvested, multiplied by the average net price per ton. The court rejected this test on the ground that before hot water was ever poured into the stream, appellee had never harvested in any one season in excess of 17,000 tons. Appellant, on the other hand suggested that the difference in rental value would be the proper measure of damages. Rejected. Appellant then suggested in the alternative that since appellee was bound to reduce his loss the cost of building pontoon bridges over the narrow channel to connect his ice fields might be a proper measure of damages. This the court also rejected, saying that "in order to reduce its loss, appellee was not required to so increase the hazards of its business as to endanger the life of any of its employees."

The rule the court finally adopted was ingenious because of the many elements which were involved. The period of time for which damage was claimed was five seasons. In some seasons the weather was mild, in others severe, which would account for variations in appellee's business irrespective of the hot water in the stream. The court in announcing the plan of estimating appellee's damages said: "We will consider the average daily capacity of appellee's plant, and the number of days in the ice-harvesting season. We may then determine the annual capacity of appellee's plant. We have concluded to limit the total tonnage in a single year to the largest yield

appellee was able to show in its history. The largest harvest was during the season of 1911-12, when appellee was unvexed by any hot water, when the ice was one inch thicker than during any other year covered by this entire period, and the ice season was the longest and most favorable to a big yield. In fixing this maximum, we also take into consideration the fact that appellee's housing capacity was but 10,500 tons, while the outside demand never equaled in any other year the amount sold during this season of 1911-12. Assuming the average daily capacity of the plant to be 470 tons and the average value of a ton of ice to be 18 cents, and limiting the total capacity for any season to 16,981 tons, the result becomes a mere matter of computation."

**CARRIERS OF PASSENGERS — NEWS AGENT AS SERVANT OF CARRIER.**—In *Blankenbaker v. Chicago, M. & St. P. R. Co.*, 168 N. W. 744, decided by Supreme Court of North Dakota, it was held that a carrier of passengers permitting a news agent on its trains to sell literature to passengers constituted him the carrier's servant in assaulting a passenger, where the assault arose out of a dispute between the passenger and the agent regarding a sale by the latter to the former.

After speaking of being "engaged in selling merchandise upon this train by the carrier's permission, and by the terms of a contract," the court said:

"We are of the opinion, and so hold, that a news agent, performing such duties upon passenger trains, is a part and portion of the passenger service furnished by the railway company to its patron passengers and stands upon the same legal basis as sleeping car service, and sleeping car employees; and although such agent may have been in the immediate employment of some other independent contractor, who was obligated by contract with the railway company to perform such services, still such news agent was also the agent of the railway company so far as concerned the transportation of passengers. Such services under said circumstances are performed as part of its general service of transporting passengers."

In final analysis this reasoning would embrace a "train butcher" selling oranges or peanuts and the keeper of an eating house or lunch counter on a right of way, notwithstanding the fact might be that no passenger could demand that they be furnished as a part of his transportation, and we greatly doubt whether it would lie within the province of any regulating commission to demand that they be supplied by a carrier to its customers.

It is possibly true that that Pullman service could be required of a carrier, but even this

we greatly doubt. That, however, is one of the recognized needs of travel. This concession, however, does not carry the inference that such service is so a part of transportation, that a Pullman company becomes merged, so to speak, therein that its acts become those of a railroad in carriage of passengers. It is a convenience, which the passenger wants or not, at his pleasure. He rides on the train, however, in a section of a public service company, and its duties are two fold—one to the passenger, the other to the public.

Let us say, also, that, as it is the duty of the state to see that no public service company shall run at a loss, so when it permits it to accommodate its passengers by supplying to them facilities outside of transportation, its arrangements therefor must be construed as periling in no way the obligation of the carrier to conform itself to the duty the state owes it. It has no right to jeopardize its usefulness for performance of its main duty.

Query.—How stands the case of a drayage company having the right to check a trunk from one's residence to his destination? That is a convenience to an intending passenger. We ask this to illustrate how very, very far, logic as to sleeping car arrangements and selling newspapers on trains may lead us. We do not object to the independent contractor theory being regarded as it was by the court. We question the holding of a carrier liable on its purely collateral contracts, merely because they are permissively made. That is a matter solely between the public utility and the state.

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### THE LAWYER IN THE WAR.

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Lawyers are trained to war; they must be equally ready for attack or defense; they must be equally skillful in thrust and in parry; they must advance quickly at the first sign of weakness, in the ranks of the enemy, and if retreat becomes necessary, it must be conducted without rout or panic, in an orderly manner, to a previously chosen position. This is why lawyers are selected to conduct wars—not always on the battlefield, but in the supreme command behind the lines.

In free countries, lawyers generally constitute or control the government which

assembles the armies that go out to fight the country's battles.

Lecky says: "Lawyers contributed more than any other profession to the revolution. Jefferson, Adams, Otis, Dickinson, and many other minor agents in the struggle were lawyers." He quotes Edmund Burke as saying: "The profession is numerous and powerful, and in most provinces it takes the lead." Lecky does not seem to think that the predominance of lawyers had an elevating influence, for after the sentence which I have quoted, he adds: "*Another influence which did much to lower the New England character* was the abundance of paper money."

Lawyers played an equally important part in the French revolution, that echo of the American revolution, which for a time was so much louder than the original explosion.

Of the states general, in May, 1789, Carlisle says that, in the commons, out of 560 members, 374 were lawyers; and Jefferson, in a letter to Madison, written in June of the same year, says there were 344 lawyers out of 554 members. In the first parliament in October, 1791, out of 745 members, Carlisle says 400 were lawyers.

Madison, Polk, Lincoln and McKinley, presidents during the wars intervening between the revolution and today, were lawyers, and America fights in the greatest war the world has ever known under the presidency of a lawyer, Woodrow Wilson. In each of the previous trials by battle, lawyers planned in the council and urged the country's cause in the forum, and the legal profession furnishes the most of the men who guide the course of government in this titanic struggle.

Stanton, Lincoln's great war secretary, and Chase, his great financial secretary, were lawyers. The Secretary of War, who on July 1st, announced to the President that we had transported over an infested ocean and landed safely on the shores of Europe 1,019,115 men, is a lawyer, and the great

Secretary of the Treasury, who has made the words "billion dollars" as common as "two bits," is a lawyer.

It would be mere affectation of learning to recite the names of lawyers who have led armies. We need not vie with the trained soldier or boast of skill upon the battlefield, but Andrew Jackson, whose name stands for the most notable victory American arms have yet achieved in battle with the soldiers of another country, was a lawyer.

Louis Cass would probably never have been a presidential candidate had he not commanded armies, proven a brave soldier and attained the title of general. The Mexican war developed a number of lawyer-soldiers, and military reputation made Franklin Pierce president. Two notable instances of lawyers who attained military prominence on the federal side in the Civil war are Logan and Ben Butler; the history of that combat is filled with the names of men who abandoned the forum for the field, and many a lawyer sealed his devotion to the cause he espoused with his blood. Hayes, Garfield and McKinley had "war records," without which neither had ever achieved the presidency.

The Confederacy, too, had lawyers in the cabinet and on the tented field. Your own John Tyler Morgan, and Pillow, a native, like Morgan, of your neighboring state, Tennessee, are two of the lawyers who proved their prowess in battle, which equalled their prowess at the bar; and the annals of every Confederate state furnish similar instances.

In the other free countries of the world lawyers play a part almost equally prominent. Asquith, under whose leadership Great Britain refused the bribe offered for her neutrality, espoused the cause of Belgium and saved France and the world, is a lawyer; he was succeeded as prime minister by Lloyd George, another lawyer, who still holds the reins of government in the Island Empire. Raymond Poincaré, president of France, is a lawyer; and in every cabinet which has guided the destiny of France dur-

ing the desperate days of the last four years the legal profession has been predominant.

It is safe to say that if lawyers exercised the same influence in the government of Germany that they exercise in the government of our Allies, a solemn treaty would never have been termed "A scrap of paper," and Germany would not have made herself an outlaw nation.

There never has been a battle for liberty fought in any country which has a legal profession, where the members of that profession have not participated on the side of liberty in such numbers as to make it safe to say that the legal profession has hearkened to every call of freedom, and has done freedom service equally valiant with the sword as with the pen.

There are many things the lawyer can do in war. In my address as president of the Bar Association of my own state last year, I took the liberty of quoting this from Madison:

"Of all the evils to public liberty, war is perhaps the most to be dreaded, because it comprises and develops every other. \* \* \* In war, too, the discretionary power of the executive is extended; its influence in dealing out offices, honors, and emoluments is multiplied; and all the means of seducing the minds are added to those of subduing the force of the people! No nation could preserve its freedom in the midst of continual warfare."

In view of what has happened, in the fifteen months we have been at war, it would seem as if Madison must have had the gift of prophecy.

Nations are much like children at play, who see one of their number injured, but pursue the same path or commit the same prank, saying, "It will not hurt me." No superhuman agency has written either fire or life insurance upon our free institution, and yet we are always acting as if we had a full-paid policy.

While our valiant sons are fighting to preserve liberty for the world, the lawyers must see that American liberty is preserved

in America. When the war against autocracy is over let us see that "Kultur" has not been transplanted, and that "Verboten" has not become too strongly imbedded in our vocabulary.

Let us not deceive ourselves. The lessons of history all prove that when the war is over there will be many men who will claim, there will be a party which will maintain, that all the extensions upon executive and congressional power which are being put in effect, are necessary to our welfare; that if they were useful in time of war they cannot but be helpful in time of peace; that if we make them a part of our permanent polity it will be unnecessary to go through the strain of re-enacting them or suffer the consequences of delay in their understanding and enforcement; we will be told that the time to prepare for the deluge is in fair weather.

All the arguments in favor of a preparedness which insures safety from attack by providing power to resent it, will be perverted to the destruction of the constitutional guarantee under which, and under God, this great free nation has been builded, the marvel of all the ages, and with fair promise of perpetuation to Eternity. To guard the corner-stones of the foundations of liberty, to keep bright the beacon fires of liberty, to perpetuate the precepts of liberty, and to keep the love of liberty alive in the hearts of the people—these are fitting tasks for The Lawyer in War.

I am not complaining that the government has assumed too much power. If I have any complaint against the government on this score, it is that the government has failed to exercise undoubted powers which should have been exercised and the exercise of which would have been invaluable to our country and our cause. I not only subscribe to the doctrine that in time of war the citizen must expect to surrender, in a large measure, freedom of speech and freedom of action, but I go further than many. I have endeavored to show elsewhere that in time of war the commander-in-chief pos-

sesses every power the rightful exercise of which can contribute to the always imperious necessity of military victory.\*

We have found some places for active service. More than 25,000 lawyers assisted men of draft age to answer the questionnaires propounded under the last selective draft regulation. • The entire bar of the United States has placed itself at the disposal of our fighting men and their families to protect them in their rights of person and property. These services have been performed and are being performed voluntarily and without thought of that fee which the vulgar attribute as the first thought of a lawyer.

Some things have resulted from war which we want to keep. We should never let our great transportation system slip back into the competitive stage. Lawyers realize that there is no more excuse for competition between railroads than for competition between other public highways. The costs of competition are borne by the public, and, unlike charity, which blesseth him who gives as well as him who receives, these costs had almost ruined those who paid them and those who received them before government interposed some measure of restraint.

That profound changes are bound to occur in our fundamental law, in our statute law, in our habits of life and in our free thought, is apparent to anyone who pauses long enough amid the battle to think about it.

• The politics, the public life—the government—of this country were dominated by the survivors of the two armies from the conclusion of the civil war until the participants in that family tragedy practically passed off the stage. The men who come back from France and Italy; the men who carry the banner of freedom across the Rhine; the men who plant that flag in the capitals of the central powers—these men, clothed in the glory of war, and still filled

\*"Military Censorship and Freedom of the Press," *Virginia Law Review*, December, 1917.

with the lofty sentiments which animate them in the fight, will take over the government of the country they will have saved.

Even as the lawyer today is giving his advice and his service freely to these men and to their families and their affairs, so he must then be ready, disinterestedly, without thought of selfishness, animated only by the same high motives of public welfare, the same intense love of right, which prompt his actions today, to give the benefit of his learning, his experience and his wisdom, to these returning heroes who, having put the forces of wrong to flight, may well be looking for new worlds to conquer.

I am, somewhat, a believer in the philosophy (if such it can be called) that human minds react on each other; that when masses of men get to seeking and searching for the same thing, although they may be separated by wide spaces and each unconscious of the others' efforts, they profoundly assist each other. President Wilson has said, "We are indomitable in our power." That power seems, at last, to have thrown off lethargy, to have broken all bonds of red tape and to have overcome inertia. The keen edged sword of America's power is being felt across the sea. That sword is cleaving a rift in the dark clouds which Death has cast across the sky. Above the awful roar of the appalling guns is heard the cry: "Thou shalt not."

Men are planning that the recurrence of this cataclysmic tragedy shall be made impossible. Lord Balfour and Mr. Taft are right in discussing now a plan to enforce the peace our khaki-clad legions shall conquer. The form and structure of the tribunal which the saved world, in gratitude and thanksgiving for its salvation, shall establish to adjudicate the differences which may thereafter arise between the nations of the world, must be devised and built by the legal profession of the world.

It is a great work, a work second only to the work of those who are making the

accomplishment of such a work possible. It is fitting work for *the lawyer in war*. That great and distinguished American lawyer, Hampton L. Carson, concluding an address before the Colorado Bar Association last year, on the Supreme Court of the United States, made this prophecy:

"No one can doubt that \* \* \* when a purified and regenerated world is seeking the means of preventing wars, our own great court will stand as the archetype for the establishment of an international tribunal by which the peace of nations can be secured."

I am sure no lawyer need hunt for a better model—the time is ripe to commence building.

No lawyer could long succeed who, having won a lawsuit for his client, failed to secure the fruits of victory. If he be for the plaintiff, his work is not finished until his client has received that to which he is found entitled. If he represents the defendant, he must see that the judgment is so entered that his client cannot be harassed or vexed again. The Lawyer in War has his greatest opportunity for service in seeing that this nation, and through this nation the world, reaps the fruits of the victory which will have been paid for in the precious blood which our allies have already shed and in the rivers of blood yet to be shed in which our blood shall mingle.

When this war is over it will be found that the greatest danger the world has faced, a danger greater than that confronted in the first well-planned onrush of the barbarian hordes toward Paris in 1914, a danger greater than the mad sacrificial charges of their renewed and consolidated armies four years later, a danger greater than when in 1917 the Huns, Goths and Vandals drove back the forces of Italy and followed the old path of invasion almost to the walls of Rome—a danger greater than all these, is the danger which will be confronted in the closing act of this awful tragedy of war—

the act that is to end with the word "Peace." It is here that *The Lawyer in War* can perform his greatest service.

If the hearts of millions of mothers, wives and children shall be outpouring prayers for peace, and, inspired alone by love, be willing to make peace on any terms which insure their loved ones' coming back, then there must be somewhere a force to stop the peace drive which will be launched from Berlin and which will find support in these loving hearts. There is no other intellectual force in this country equal to that of the American Bar. The lawyer thinks through habit. The mass of people simply have opinions. The lawyer is accustomed to formulate his arguments according to the rules of logic and has the capacity to convince. Who so well as the lawyer can make the people see the dangers of the future by pointing to the past? And so the greatest task of *The Lawyer in War* is to educate, train, inform and reason with the American people, that they will neither demand nor accept any peace but a compelled peace, a dictated peace, a peace following complete and overwhelming victory.

Every statesman, every orator, every writer who assumes to speak for the civilized peoples of mankind, has denounced the Force attacking the world as a Force impelled by thoughts which have no place but in the mind of the savage; every eye-witness who has described the methods by which this Force pursues its design has described deeds of savagery so horrible that the mind of the world is shocked into unbelief. The things which the evidence, blazoned before all the world, shows have been done by the Prussian overlords and their more than willing followers, are so utterly beyond the possibility of conception, much less sanction, by civilized men, that it needs a mental process, like the solution of a problem in algebra, to make the ordinary mind accept them.

Yet these things have been done in the open light of day, not once but a thousand

times. Are the civilized nations who have been wantonly attacked, whose lands have been wasted, whose people have been outraged and murdered, whose women and children have been made victims of a thousand and cruel barbarities which the soldier who dies in battle can never know, justified in declaring Germany an outlaw? If they are justified in proclaiming sentence of outlawry, will they be justified when the outlaw has been captured and brought, manacled, to the bar of world justice, in loosing him to terrorize the world again at his leisure? The proposition is repugnant to the instinct of every lawyer.

Every lawyer knows that the criminals who brought this deluge of blood upon the world should be punished, and that unless they are punished the world cannot lay down its arms; that the world cannot devote its energies to rebuilding that which has been destroyed, to filling the vacuum which has been created by the awful suction of death and destruction but must wait with loaded arms for the next onslaught.

Every lawyer whose taste runs at all to forensic effort or forensic triumph has read the speech of Edmund Burke on the impeachment of Warren Hastings. Macaulay outdid himself in his description of the scene:

"The High Court of Parliament was to sit, according to forms handed down from the days of the Plantagenets, on an Englishman accused of exercising tyranny over the lord of the holy city of Benares, and the ladies of the princely house of Oude.

"The place was worthy of such a trial. It was the great hall of William Rufus; the hall which had resounded with acclamations at the inauguration of thirty kings; the hall which had witnessed the just sentence of Bacon and the just absolution of Somers; the hall where the eloquence of Strafford had for a moment awed and melted a victorious party inflamed with just resentment; the hall where Charles had confronted the High Court of Justice with the placid courage which has half redeemed his fame."

He compares the occasion with "the days when Cicero pleaded the cause of Sicily

against Verres, and when, before a senate which had still some show of freedom, Tacitus thundered against the oppressor of Africa."

There an Englishman, who had, by the power of England, been sent to rule over "dusky nations living under strange stars, worshipping strange gods, and writing strange characters from right to left." was brought to the bar of English justice.

In concluding his indictment of the culprit, Burke said:

"I impeach Warren Hastings, Esquire, of high crimes and misdemeanors. \* \* \*

"I impeach him in the name, and by virtue, of those eternal laws of justice which he has violated."

If I were to draw the indictment against William Hohenzollern, King of Prussia, Emperor of Germany, and Dictator of the Central Powers, I would not indict him for any such crime as the disregard of a treaty, or the violation of the laws of war. Crimes like those crimes have been charged and proven against human beings. I would impeach this man for the monster he has proven himself to be. I would impeach him, not as a man but as a hell escaped devil. I would impeach him for murder on land, murder on sea, murder from the air, murder by poison, murder by stealth, murder of soldiers, murder of sailors, murder of civilians. I would impeach him for the murder of the Priests of God's Altar and the rape and murder of women vowed to chastity and to God's service in works of charity and mercy. I would impeach him for having spitted babes on bayonets, outraged women of all ages, crucified men, burned churches, libraries, homes, villages, towns and cities, and for having destroyed cathedrals, monuments of what exalted faith can inspire man to accomplish. I would impeach him for having carried tens of thousands of men, women and children into slavery, more cruel than that in which the Egyptians held the Israelites, until they were released by the hand of the Divine God himself. I would impeach him be-

cause he has made lust a virtue, and virtue a crime, punishable with death. I would impeach him of these and of the nameless crimes which make the very air he breathes foul and leprous and which will make him still a loathed thing when mankind shall have finished its work on earth and pass through the open gates of eternity. I would impeach him before the High Court of the World and in the presence of the Living God as the Incarnate Spirit of Hell, escaped without Divine knowledge, to violate on earth every law made in Heaven.

When glutted, gorged, satiated, tired and worn, the ogre cries for peace, shall we treat him as we would a human being, an honest and a chivalrous adversary? No, and No!! and a thousand times, No!! If man is impotent to punish these crimes, it will behoove Omniscience to send a new Redeemer into the world; there must be another Cross, another Calvary. Another Gethsemane will be necessary to save the world and make it a fit place for human habitation.

The place where Christ expiated the sins of a sin-incrusted world is already a spoil of war, wrested from impious and infidel hands after thirteen centuries of Moslem dominion. The pious work which Peter the Hermit preached and for which Paladin and Peer in countless numbers died, has been accomplished by one of our allies.

The crusade to rescue the tomb of the Savior has succeeded after nearly a thousand years. America has already sent more than a million men, and is preparing other millions to go, upon a crusade more glorious than the crusade to recover the Holy Sepulcher. Many of our crusaders crossed more miles of land to set sail upon this crusade than intervene between the starting place of Richard Cœur de Lion and the Mount of Olives; all have crossed more miles of water than any of these ancient crusaders ever dreamed of sailing. These American crusaders, marching under the starry flag of our united country, carry with them the

soul and spirit which Jesus of Nazareth brought into a stricken world for its redemption; they go to make good His promise that the gates of hell shall not prevail; they fight that the stone which the angel rolled away at Jerusalem on that Easter morning long ago shall never be put back, and that all the dark places of the earth shall be made bright with the light of His teachings, aflame in the souls of men.

THOS. J. O'DONNELL.

Denver, Colo.

#### INSURANCE—INSOLVENCY.

BOYD et al. v. WRIGHT, Ins. Com'r, et al.

Supreme Court of Georgia. July 9, 1918.

96 S. E. 388.

In the distribution of the assets of an insolvent insurance company, the general rule is that all creditors are upon an equal basis; and this rule applies as between all classes of policy holders.

(a) There is nothing in the present case to take it out of the general rule.

(b) Holders of policies, who are suing for "death claims," are not entitled to priority of payment out of the assets of the insolvent corporation over living policyholders in the same corporation.

HILL, J. (1, 2) Under the pleadings and record in this case, the question to be determined is whether the "death claimants" are entitled to priority of payment out of the assets in the hands of the insurance commissioner, as against living, or continuing, policy holders in the stock company—the Empire Insurance Company. The decree rendered by the trial judge adjudicated that death claims arising under the mutual and the stock company stood upon the same basis, and no exception was taken to this ruling. It was also held that as between the death claimants and the living policy holders, under both companies, the death claimants are entitled to priority of payment; and this is the question to be considered and decided. Interveners alleged and insisted that the company had breached its contracts by failing and refusing to perform its obligations in accordance with the terms

of the policies, and prayed that they might recover damages for a breach of the contracts. The case as made does not call for a decision as to the correct measure of damages on the breach of the contract by the failure of the insurance company. But the question is on the clear-cut issue, made by the record, whether the death claimants are entitled to priority of payment over the living policy holders, as to the funds in the hands of the controller general, who is also ex officio insurance commissioner of the state. Under the facts of this case, it seems to us that each class of claimants stands upon the same basis. We see no good reason why a death claimant is entitled to priority over the living policy holders, whose policies have an accrual or cash surrender value of a certain amount. Upon what basis of law, justice, or equity is the one class entitled to priority over the other?

It was insisted by one intervener that she was entitled to priority in payment out of the assets of the mutual company which were acquired by the stock company under the contract of May 2, 1912, and that the assets were impressed with a trust in the hands of the stock company and should be applied to the claims against the mutual company before any of the assets were to be applied to claims against the stock company. The court found:

"That the whole amount of unpaid death claims of all classes, not including contested death claims, is about \$133,804.82. That all of the claims were based upon policies issued by the mutual company, except claims aggregating about \$14,301.54. Health claims unpaid amount to about \$400. That the holders of claims on account of deaths insured against by the mutual company should be paid from the assets of the mutual company prior to the claims of other policy holders on any account whatsoever. And the court further finds that a sum of money has been paid from the assets of the stock company in satisfaction of death claims based upon policies issued by the mutual company in excess of the amount of claims now outstanding, and based upon policies issued by the stock company, and for the purpose of equalizing the outlay made by the stock company on account of the liability of the mutual company, as hereinbefore detailed."

The court then—

"ordered that death claims upon policies issued by the mutual company and by the stock company be paid out of the assets in the hands of said insurance commissioner, whether the same were owned by either the mutual company or the stock company, in priority to and over other claims of policy holders on any account whatsoever, and that such claims, when based upon policies issued by the mutual company, or upon policies issued by the stock company, shall have no priority one over the other, but

the said policies shall be paid upon a basis of equality. Payments shall be so made until said policies shall have been paid in full, or until the assets of said estate shall have been exhausted."

In the case of a mutual fire insurance company (Taylor v. North Star Mutual Ins. Co., 46 Minn. 198, 48 N. W. 772, it was held that:

"All the outstanding policies at the date of the sequestration of its assets must be deemed to stand on the same footing, and the policy holders are entitled only to the surrender value of the same."

The holder of an unmaturing life policy is a creditor of the insurance company issuing the policy, and is entitled to share with the other creditors in the assets of the corporation. Any question as to the value of the unmaturing policies, and how such values may be ascertained, is not involved in the present suit. When a life insurance company is adjudged insolvent, the claims accruing to its policy holders are in the nature of damages for a breach of contract, which occurs at the date of dissolution of the company, and the damages which may be recovered are the value of the claims at that date. See Fuller v. Wright, 147 Ga. 70, 92 S. E. 873; Commonwealth v. American Life Ins. Co., 162 Pa. 586, 29 Atl. 660, 42 Am. St. Rep. 844. The general rule for the distribution of the assets has been thus stated:

"In distributing the assets of an insolvent life insurance company, the general rule is that all creditors stand on an equal footing; and this rule applies between policy holders of all classes, matured and unmaturing, though there are cases giving priority to matured policies in mutual companies. Auditors appointed to distribute the assets of an insolvent life insurance company cannot separate mutual policies from ordinary policies in the distribution, if the company has never preserved a separate fund for the payment of mutual policies." 14 Ruling Case Law, 855 (21); 22 Cyc. 1408 (h); Commonwealth v. Am. Life Ins. Co., 170 Pa. 170, 32 Atl. 405; Shloss v. Metropolitan Surety Co., 149 Iowa, 382, 128 N. W. 384.

And see note to Boston & Albany Railroad Co. v. Mercantile Trust Co., 38 L. R. A. 97, 193. And we think the above states the general rule correctly. There is nothing in the present case to take it out of the general rule. We think, therefore, that the court erred in giving priority to the "death claims" over the claims of holders of life policies in the stock company.

Judgment reversed. All the Justices concur.

NOTE.—*Insolvency of Insurer as Fixing Status of Claims by Policy Holders.*—It does not definitely appear, by the instant case, that the "death

claimants" referred to were for claims maturing prior to insolvency of the insurer, but we take it that they did so mature, as otherwise they as beneficiaries would have had no standing in court as to any claim.

Thus it has been held that liability of insurer for future losses is terminated by insolvency. Todd v. German Am. Ins. Co., 2 Ga. App. 789, 59 S. E. 94; Boston & A. R. Co. v. Merc. Trust & D. Co., 82 Md. 535, 34 Atl. 778, 38 L. R. A. 97.

And by the appointment of a receiver. Doane v. Millville M. M. & F. Ins. Co., 43 N. J. Eq. 522, 11 Atl. 739; Ins. Com'r. v. Com'l Mut. Ins. Co., 20 R. I. 7, 36 Atl. 930. And even by the granting of injunction against doing further business following appointment of receiver. Michel v. So. Ins. Co., 128 La. 562, 54 So. 1010, Ann. Cas. 1912 C, 810; Com. v. Mass. Mut. F. Ins. Co., 119 Mass. 45; Davis v. Shearer, 90 Wis. 250, 62 N. W. 1050.

While there might be some debate as to the effect of an unsuccessful final effort to procure the appointment of a receiver, or some question raised as to collusive attempt to have a company's affairs brought into liquidation, yet *prima facie*, at least, the appearance of an insurance company in court and making no objection to its being proceeded against for appointment of a receiver, binds its policy holders. Reliance Lumber Co. v. Brown, 4 Ind. App. 92, 30 N. E. 625.

At all events it has been held, that where an insurance company has been adjudged insolvent, there arises a breach of its engagements with policy holders, and the judgment of insolvency relates back to the initiation of proceedings against it. Fuller v. Wright, 147 Ga. 70, 92 S. E. 873, L. R. A. 1917 E, 1130.

As ruled in People v. Lee L. Ins. Co., 78 N. Y. 114, 34 Am. Rep. 522, a life insurance company adjudged insolvent and being dissolved is deemed to have broken its engagements with its policy holders and to have become liable to them on account of such breach.

As stated in Com. v. Am. L. Ins. Co., 162 Pa. 586, 29 Atl. 660, 42 Am. St. Rep. 844, "the policy holders are in the same position as any other person would be who had running contracts of value with the company which it had broken."

In Boston & A. R. Co. v. Merc. Trust & D. Co., *supra*, the court after first saying that insolvency of insurer cancelled outstanding policies for the future, said: "It is apparent that all casualties for which the various insured corporations and individuals holding the insolvent company's policies might be responsible must have happened either before or after the date of the insolvency. If \* \* \* after the insolvency was declared, then inasmuch as the insolvency cancelled the policies, there can be no claim under the policies." This, however, was held not to exclude claim for damages for result of any accident happening prior to adjudication of insolvency.

In Williams v. United R. Fund Association, 166 Mass. 450, 44 N. E. 342, it was claimed by holders of matured benefit certificates that they should be paid in preference to other liabilities of insolvent insurer. Holmes, J., said: "Perhaps it

would be enough to say that petitioners' certificates had not matured at the filing of the bill and that the rights of the parties were fixed at that date. But we may add that the petitioners' argument is based on a fallacy. If, as no doubt is true, the endowment fund is a trust fund for payment of the petitioners, it is so equally for all holders of benefit certificates. \* \* \* The rule of distribution in winding up a company of this sort necessarily is different from the order of payments made by it while a going concern."

So it seems, that the rule is almost, if not absolutely, universal, that, if insolvency ensues, policies that otherwise would not then have matured, all mature by the fact of insolvency and as of that time. In the distribution of the assets of an insurer there is to be equality among policy holders. This principle may be thought applicable *inter sese* to contracts between members of a fraternal benefit society. C.

## ITEMS OF PROFESSIONAL INTEREST.

### CHANCELLOR HOWELL'S JOURNAL ANECDOTES.

The Newark "Sunday Call" of August 4 published interesting extracts from a journal kept by the late Vice-Chancellor James E. Howell, says the New Jersey Law Journal, some of which are well worth reading by lawyers who may not have seen that publication. The extracts consisted of anecdotes about members of the Bench and Bar in New Jersey, and of others connected with the Courts. We quote the following, beginning with an anecdote of former Chancellor Zabriskie, of whom the journal said:

"Inasmuch as he was a man of positive views and knew that he was always right, he did not relish reversals. One day he had just finished reading an opinion of the Court of Appeals in which one of his pet decrees had been destroyed and was smarting under the lash. A young gentleman called with a letter of introduction from a rather prominent solicitor. The following colloquy is said to have taken place between them:

Chancellor (gruffly)—"Well, young gentleman, what do you want?"

Young Gentleman (timorously)—"I would like to be appointed a Master in Chancery and Mr.— (the writer of the letter) thought that you would appoint me."

Chancellor (savagely)—"Do you know what the duties of a Master are?" (Then suddenly relenting): "They are to advise the Chancellor

in cases of doubt and difficulty. Do you think you are competent to do that?"

Y. G.—"No, sir, but I want the appointment in order that I may take acknowledgments."

C.—"Oh! I can't do that. I cannot appoint masters merely to take acknowledgments. Why, the Judges of the Supreme Court can do that. I would like to appoint you a Judge of the Supreme Court."

"The case of Stephens & Condit Transportation Company against Tuckerman was the subject of at least one good joke. The report shows that it was argued in the Court of Errors by Cortland Parker, on the one side, and Thomas N. McCarter on the other. The point of the jest lies in the fact that McCarter was very stout and Parker quite bald. It was shown in the case that the transportation company loaded a barge with hay for some point on the Hudson river, and after her hold had been filled up with this comparatively light article of commerce they piled 200 tons of pig iron on the deck, and then started the top heavy vessel under the convoy of a tug boat up the Hudson. She went along all right until she reached the Tappan Zee. There a heavy storm arose, which overturned the barge, and Tuckerman's pig iron went to the bottom. The defendant was charged with negligence and pleaded the 'act of God' as an excuse.

"Shortly after the trial—or perhaps after the final argument—the opposing counsel met at a wedding. Parker approached McCarter and, pointing to his protuding abdomen, said: 'You seem to have your iron in your hold to-day.' 'Yes,' said McCarter, looking at Parker's bald head, 'but you haven't much hay on your upper deck.'"

"There was in the forties a justice of the peace in South Jersey, I think in Camden, named Emmell, who was a character, as the phrase goes, and of whom many good stories are told. He belonged to that sect of religionists known as Hickory Quakers, and was noted for his adherence to his own ideas. George M. Robeson told me this story about him. George was employed in his young days to defend an action brought in Justice Emmell's court. He appeared, and at the close of the plaintiff's case, every inch of which had been stubbornly fought, George made fourteen motions to non-suit, the last one of which he thought had a real foundation. After argument, the 'Squire said, by way of decision: 'I believe thee is right, George, but thee have been so ornery all day I am going to decide against thee.'"

"George Wood, of Somerset county, was probably the ablest lawyer that New Jersey

has produced. In his day he was reckoned the equal of Webster and Mason. It is related that Mr. Webster was once retained to argue a case before the United States Circuit Court at Trenton, and on the day appointed he went with his clients to the court. There he found Mr. Wood retained on the other side already in the courtroom. After a hearty greeting, for they were already acquainted and had frequently met on opposite sides of various causes, Mr. Wood sat down and assumed a musing attitude. After a short time Mr. Webster's client ventured to ask who that sleepy-looking individual at the next table was. Mr. Webster said: 'If he's asleep, don't for God's sake wake him. That's George Wood.'

"Judge Andrew Kirkpatrick, of the United States District Court, was married twice, and there were several children of the second marriage. When the second child was born Halsey Barrett asked the Judge whether it was a boy or a girl and what name had been given to it. He said that he proposed to call it No. 2, Series B; a nomenclature which the Judge had evidently derived from his rather intimate knowledge of the bonding operations of great railways.

"A story is told by Gilbert Collins in the trial of an equity case before Vice-Chancellor Pitney. Collins was examining a stupid witness who knew the whole transaction required to be proved. Collins had coached him somewhat, because he knew of his stupidity, and when he put him on the stand he proceeded very carefully in order that he might not disturb the witness' equilibrium. He led him along until he came to the crucial question. When he put it the witness flew the track and didn't answer as he was expected to. Collins was very much annoyed, and he started with him again and took him by easy gradations up to the special point that he desired to prove, and the witness again flew the track. Vice-Chancellor Pitney by this time had become very much interested. He saw what Collins was trying to do and made a suggestion or two to help Collins out, but naught would do. Collins began with the witness again and led him up to the point a third time and again he flew the track, whereupon Collins turned around with his back to the Court and said: '—such a witness.' And then, realizing that he was guilty of contempt of court for such an unusual and violent expression, he proceeded to apologize to Vice-Chancellor Pitney, who said: 'Mr. Collins, the Court will excuse you, because you merely expressed what the Court had in mind.'"

"Benjamin F. Lee, formerly clerk of the Supreme Court, told me this story: When Mr. Lee's father died, Mr. Lee came into a patrimony of greater or less amount, and he, too, being somewhat thrifty, determined to take advantage of the superior knowledge of Dr. Wales, a lay Judge of the Court of Errors and Appeals, so he applied to the doctor for some advice about investments. Arriving at the doctor's office one morning, he said: 'Doctor, you know my father has died and left me some money, and I thought I would come around and talk with you about investing it.' 'Benny, how much have you got?' asked the doctor. Mr. Lee told him, and then the doctor thought a while and said: 'Benny, the legal rate of interest is 7 per cent. You can't do much better than that. After you have ascertained how much money you shall need in your business, convert all the rest of your property into cash and loan it on bond and mortgage at 7 per cent. You will be able to make enough money out of your business to furnish you with a living, so that you will not be obliged to use any of the interest and income of your investments, and you will probably be able to add somewhat to your capital out of the profits of your business. Do this, and don't spend a cent of your income; don't think of anything except this pile of money; add to it whenever you get an opportunity; think of nothing but saving, and by the time you are 70 years of age you will be worth about \$750,000 and you will be as mean as hell.'"

The journal contains several stories of Judge Andrew Kirkpatrick, in addition to the one quoted above. Here is one:

"When Kirkpatrick was Common Pleas Judge in Essex he had a very severe attack of gout, and was obliged to be taken to Court and from Court home again in a carriage, because he couldn't walk. Hobbling out of the Market street side of the Courthouse one day, he met a friend, who asked him what was the matter. The Judge said: 'I've got the gout.' Immediately his friend replied: 'I know something that is good for that. You stop at the drug store down here at the corner and get so much of this, that and the other thing; make a lotion of them, and tonight when you go to bed bathe your foot with that lotion; make it hot and rub it in hard.' The Judge said, in his squeaky voice: 'Rub it in! My God, I don't dare look at it.'"

One of the stories concerns the father of former Secretary of War Garrison.

"The father of Mr. Justice Charles G. Garrison, of the Supreme Court, and Lindley M.

Garrison, was an Episcopal clergyman. For many years he had charge of a church in Camden, and Abraham Browning, a noted lawyer of Camden county, was one of his parishioners. Mr. Browning was not an assiduous attendant at church, and it was really a surprise to Mr. Garrison to find one morning as he went to his pulpit that Mr. Browning was occupying a front seat. He read the parable of the unjust steward and took his text from it.

"At the close of the service the clergyman hurried down to greet Mr. Browning, and caught him as he was emerging from his pew, and after a few preliminary words he said: 'Mr. Browning, how did you like the sermon?' Mr. Browning said that he didn't hear it. Mr. Garrison replied that it seemed strange, because he seemed to be paying close attention to it. 'No,' Mr. Browning said. 'When you announced your text I began to consider what I would do in case the unjust steward was in my employ. Two methods suggested themselves to me; one was whether I could bring an ordinary common law action of assumpsit and take an accounting before a jury, or whether I would be driven to a bill in Chancery to compel him to make discovery.'"

### BOOKS RECEIVED.

American Digest, Annotated. Key Number Series, Vol. 4-A. Continuing the Century Digest and the First and Second Decennial Digests. A Digest of all Current Decisions of all the American Courts, as Reported in the National Reporter System, the Official Reports, and Elsewhere, from August 1, 1917, to January 31, 1918, and Digested in the Monthly Advance Sheets for September, 1917, to and including February, 1918. St. Paul: West Publishing Company, 1918. Review will follow.

Corpus Juris. Being a Complete and Systematic Statement of the Whole Body of the Law, as Embodied in and Developed by all Reported Decisions. Edited by William Mack, LL.D., Editor-in-Chief of the Encyclopedia of Law and Procedure, and William Benjamin Hale, LL.B., Contributing Editor of the American and English Encyclopedia of Law and the Encyclopedia of Pleading and Practice. Volume XVI. New York: The American Law Book Co. 1918. Review will follow.

### HUMOR OF THE LAW.

"And what did the doctor tell you?"

"Why, he looked me over and asked if I had made a will."

"Ah, is your condition so bad?"

"I don't know; but his brother is a lawyer."

—Richmond Times-Dispatch.

Thomas B. Reed once went into an unfamiliar barber shop to be shaved. The negro barber began to try to sell a hair tonic.

"Hair purty thin, suh," he said; "been that way long, suh?"

"I was born that way," replied Reed. "Afterward I enjoyed a brief period of hirsute efflorescence, but it did not endure."

The barber gasped and said no more. Later, someone told him he had shaved the speaker.

"Speakah!" he exclaimed. "Don' I know dat? I should say he was a speakah, sure 'nuff!"—Christian Register.

Ernest Poole, novelist, said at a Socialist meeting in Troy:

"The Bolsheviks are applying to the Germans the Tolstoyan principle of non-resistance to evil, but they are following Tolstoy too literally. To be too literal is to be ludicrous.

"It's like the case of the brakeman who was learning the ropes on a first trip.

"'I'll yell out the names of the stations,' his teacher said to him, 'and you listen and then yell the same at your end.'"

"So the train started off, and when the first stop came, the veteran at the front of the car yelled: 'Iola! Iola!' and then the new man at the rear door yelled:

"'Same at this end! Same at this end!'"

Paul Gary of Anderson, Ind., is all American, with the exception of a glass eye. The substitute optic is alien.

Gary tried to enlist in the United States Marine Corps at their recruiting station here, but was rejected when his infirmity was discovered by Sergeant G. C. Wright.

"Didn't you know that the loss of an eye would prevent your enlisting?" asked the sergeant.

"I thought it might," explained Gary; "but this glass blinker is the only part of me that was made in Germany, and I want to take it back."

He was advised to mail it.—Exchange.

## WEEKLY DIGEST.

## Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

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1. **Assault and Battery**—Waiver.—Where private person arrests another for a criminal offense in his presence, a release on agreement that, if one arrested was not turned over to peace officer, he would not return to former's premises, does not alone waive right of one arrested to recover for former's assault and battery.—*Tipword v. Potter*, Idaho, 174 Pac. 133.

2. **Assignments for Benefit of Creditors**—Waste.—An action against an assignee for benefit of creditors in his individual capacity to recover damages for waste committed by him cannot be maintained by filing a petition in the assignment proceedings, but the remedy is by separate action.—*In re Berger Catering Co.*, Mo., 204 S. W. 938.

3. **Attorney and Client**—Authority of Counsel.—Where litigation, if successful, would result in a recovery of property on which the counsel of plaintiff in error would have a lien for fees, plaintiff in error cannot withdraw his writ of error over his counsel's objection.—*Corbin v. McCrary*, Ga., 96 S. E. 445.

4. **Lien on Papers**—An attorney may have, for his services, a retaining lien, authorizing him to hold papers or moneys coming into his possession professionally, and a charging lien, or right to recover from and against the fund recovered by his aid.—*Hale v. Tyson*, Ala., 79 So. 499.

5. **Suspension**—Under Code Civ. Proc. § 287, providing that an attorney may be suspended on the ground that he has been convicted "of a felony or misdemeanor involving moral turpitude," it is immaterial whether the crime is a felony or misdemeanor as defined by Pen. Code, § 17.—*In re Thompson*, Cal., 174 Pac. 86.

6. **Bankruptcy**—Plenary Suit.—Where property is in possession of a third party claiming title adversely to the bankrupt, based upon a transfer antedating the bankruptcy, the claim of the trustee thereto cannot be summarily determined by a referee, but a plenary suit is necessary.—*In re Phoenix Planing Mill*, U. S. D. C., 250 Fed. 898.

7. **Banks and Banking**—Acquiescence.—Where bank directors acquiesced in all acts of the president and cashier, who were the principal stockholders, a deed executed by them, without special authority, was binding on the bank.—*Farmers' & Mechanics' Bank v. Western Loan & Building Co.*, Wash., 174 Pac. 1.

8. **Burden of Proof**—Defendant bank, alleging error in cashier's entry upon a passbook, had the burden of showing error by a prepon-

derance of the evidence; but if depositor, after return of corrected passbook, did not object to correction for some time, he had burden of showing that correction was erroneous.—*L. J. Brosius & Co. v. First Nat. Bank*, Okla., 174 Pac. 269.

9. **Fictitious Payee**—Where a bank check is drawn in favor of a fictitious payee, whom the drawer in good faith and without fault believes to be a real person, and such check is fraudulently indorsed by another in the name of the payee, the payment thereof cannot operate as payment of any part of the bank's debt to the depositor.—*Padgett v. Young*, Tex., 204 S. W. 1046.

10. **Bills and Notes**—Bona Fide Holder.—Indorsee's knowledge that note was given in consideration of an executory contract with the payee, even though contract be expressed in instrument itself, will not deprive him of character of bona fide holder, unless he also has notice of payee's breach of agreement.—*Reese v. Citizens' Bank of Roswell*, Ga., 96 S. E. 452.

11. **Bona Fide Purchaser**—An assignment of negotiable instruments before maturity as collateral security for a pre-existing debt is an indorsement for valuable consideration, sufficient to protect the purchaser under the law merchant against defenses of which he has no notice at the time of the indorsement.—*Pezzoni v. Greenwell*, Cal., 174 Pac. 60.

12. **Holder in Due Course**—The transferee of negotiable paper, who receives it before it is due, cannot be affected by any agreement between other parties thereto, in the absence of notice.—*Dorris v. Farmers' & Merchants' Bank of Cumming*, Ga., 96 S. E. 450.

13. **Innocent Purchaser**—Buyers of notes from payees, knowing of their misrepresentations inducing the making of the contract under which they were given, are not innocent purchasers, though not knowing of the fraudulent intent, or the particular means by which each fraud was perpetrated.—*Schallert v. Boggs*, Tex., 204 S. W. 1061.

14. **Negotiable Instruments Law**—Rem. & Bal. Code, § 3509, discharging a negotiable instrument when the debtor becomes the holder in his own right, is only intended to protect parties, and as to a person who is not a party and against whom no liability can be enforced in an action on the instrument, it is not discharged when the parties to it, the principal debtors, admit it is still in effect.—*State Finance Co. v. Moore*, Wash., 174 Pac. 22.

15. **Brokers**—Dual Agency.—In action by broker for commission on exchange of land, there could be no recovery where it appeared that broker, unknown to parties, was agent for both, although answer contained merely a general denial.—*Riggins v. Patterson*, Cal., 174 Pac. 119.

16. **Introducing Purchaser**—Mere fact that agent introduced purchaser to seller or disclosed names by which they came together would not entitle agent to commission.—*Baltimore Car Wheel Co. v. Clark*, Md., 14 Atl. 357.

17. **Carriers of Goods**—Delay.—In action against carrier for negligent delay in delivering goods, brought to recover exemplary damages, allegation that the carrier "wantonly refused or failed to deliver" the goods did not warrant recovery of exemplary damages; the pleading being no stronger than its weakest alternative.—*White v. Louisville & N. R. Co.*, Ala., 79 So. 598.

18. **Warehouseman**—Where goods were consigned to place in Texas, care of third person, "not for purpose of delivery," ultimate delivery being to consignee in Mexico, and it was the custom of the carrier after goods had been changed to Mexican car to transfer them across border to carrier in Mexico, payment of freight and notice to carrier by consignee that he had transferred goods to Mexican car was sufficient to render carrier liable, as a carrier, and not as warehouseman for negligent delay in transporting the car whereby goods were destroyed by fire; no formal acceptance being necessary.—*Galveston, H. & S. A. Ry. Co. v. La Tolteca Cia de Cemento Portland*, S. A., Tex., 204 S. W. 1016.

19. **Carriers of Passengers**—Interstate Commerce.—Railroad engaged in interstate commerce, under U. S. Comp. St. 1916, § 8569, subd.

7, could not extend to any shipper or person any privileges or facilities except those specified in tariffs filed as required.—May v. Seaboard Air Line Ry. Co., S. C., 96 S. E. 482.

20. **Chattel Mortgages**—Conversion.—Although first chattel mortgage was voidable, mortgagor could not recover against first mortgagee for conversion of the property where at time of the conversion the first mortgage had not been declared void, and the property was turned over to the first mortgagee by a second mortgagee in possession thereof under a valid mortgage after condition broken and while a balance was due on the second mortgage, under belief that first mortgagee had prior lien; for, since such surrender was not waiver of the second mortgagee's lien, the second mortgagee was the only one entitled to possession at that time.—Cook v. Smith, Mo., 204 S. W. 919.

21. **Commerce**—Sleeping Car.—Pullman equipment, used by a railroad entirely in interstate traffic, is not taxable in the state.—West Shore R. Co. v. State Board of Taxes and Assessment, N. J., 104 Atl. 335.

22. **Constitutional Law**—Administrative Board.—The state may delegate to an administrative board the power to adopt reasonable regulations and to adopt what tests it deems necessary in order to ascertain the existence of a disease; this not being a delegation of legislative power, but merely relating to a procedure in the law's execution.—Neer v. State Live Stock Sanitary Board, N. D., 168 N. W. 601.

23.—**Arrest Without Warrant**.—An arrest without a warrant upon mere verbal request of a citizen, where officer has no cause to suspect commission of offense, is in violation of constitutional guaranty that no citizen shall be deprived of his liberty except by due process of law.—Ex parte Rhodes, Ala., 79 So. 462.

24. **Contracts**—Fraud.—Representations to plaintiff, stockholder in a company, that shares of its stock had been turned back to it by a subscriber unable to pay therefor, with solicitation of plaintiff to buy it "to help out the company," relate to "material matters," within Rev. Codes, § 4978, defining fraud.—Stillwell v. Rankin, Mon., 174 Pac. 186.

25. **Corporations**—Receiver.—Where annual income of corporation could not exceed \$200 or \$300 at most, but its trustees had voted themselves salaries amounting to \$750 per month, and had otherwise so mismanaged its affairs that it was in imminent danger of insolvency, if not already so, a receiver was properly appointed for it at suit of stockholders.—Kahle v. Industrial Loan & Investment Co., Wash., 174 Pac. 23.

26.—**Specific Performance**.—In suit for specific performance of contract to buy corporate stock, it was not a defense that the statement in writing called for by supplement to the Corporations Act (Act Feb. 19, 1913 [P. L. p. 29]) was not filed when the stock was issued, at least where such statement was filed after suit was brought.—Bartley v. Lindabury, N. J., 104 Atl. 333.

27. **Damages**—Bad Faith.—Under Civ. Code 1910, § 4392, as to allowance of damages where defendant has acted in bad faith, been stubbornly litigious, or has caused plaintiff unnecessary trouble and expense, in an action for failure to deliver lumber sold, bad faith in matters arising after the refusal of defendant to comply with his contract are immaterial; "bad faith" to authorize recovery of attorneys' fees being bad faith in a transaction out of which cause of action arises.—Twin City Lumber Co. v. Daniels, Ga., 96 S. E. 437.

28.—**Remoteness**.—An injured servant cannot recover as an element of damages for any embarrassment that may result from his changed appearance due to the accident, such element of damages being too remote and indefinite.—Camenzind v. Freeland Furniture Co., Or., 174 Pac. 139.

29. **Divorce**—Coram Non Judice.—The action of the circuit judge in awarding a father custody of his children, on petition of their divorced mother to require the father to contribute to their support and maintenance, the custody of the children having been awarded the mother by

prior order of court, and such order not being questioned, was coram non judice and void.—Graham v. Graham, Tenn., 204 S. W. 987.

30. **Druggists**—Advertising.—The word "remedy" is not synonymous with "cure," but means that which relieves or cures a disease, including medicine or remedial treatment; and hence to advertise a medicine as a remedy for certain diseases, when the manufacturer had been informed that it relieved same, is not "misbranding" within Food and Drugs Act, on theory that medicine was advertised as cure for such diseases.—United States v. Natura Co., U. S. D. C., 250 Fed. 925.

31. **Electricity**—Discrimination.—If an item in a franchise by a city to an electric company is invalid because discriminatory, but the city and the light company are satisfied with the remainder of the franchise, a competing company cannot complain that the whole franchise is invalid.—State ex rel. Electric Co. of Missouri v. Atkinson, Mo., 204 S. W. 897.

32. **Estoppel**—Grantor and Grantee.—Where the grantor of land reserved such mining rights as would not disturb, damage, or interfere with the grantee, the grantee was not estopped by the deed to complain of particular mining operations, which disturbed the quiet and peaceable possession and enjoyment of his premises, or acts which damaged his property.—Cavanaugh v. Corbin Copper Co., Mont., 174 Pac. 184.

33. **Exemptions**—Interpleader.—In attachment, where an absconding debtor's wife interpleaded, claiming exemptions, an instruction that interpleader could not recover if she were about to move out of the state with the intent of permanently changing her domicile, was not erroneous in view of evidence, Rev. St. 1909, § 8057, defining residence as a place where a person shall permanently reside in this state.—White v. Lee, Mo., 204 S. W. 936.

34. **Executors and Administrators**—Power of Appointment.—Where estate was devised to widow, with power of appointment as to part of the estate, any residue remaining to go to certain legatees, debts paid her executors cannot be included in their account of the decedent's administration of her husband's estate, as their payment devolved on the administrator of the husband's estate; but the latter could not pay for expenses of administration and litigation concerning the widow's own property, under Rev. St. 1916, c. 68, §§ 25, 27.—Appeal of Libby, Me., 104 Atl. 351.

35. **Explosives**—Ordinance.—An ordinance providing for the inspection of gasoline, benzines, naphthas, and requiring the specific gravity thereof at 60 degrees Fahrenheit to be between 58 and 84, is void for uncertainty, and because unreasonable and impossible of performance; the specific gravity of heaviest substance known being only 22.5.—Standard Oil Co. v. City of Birmingham, Ala., 79 So. 489.

36. **False Pretenses**—Elements of Offense.—If accused falsely represented that described land was open to homestead entry and thereby induced prosecuting witness in reliance thereon to pay him money for securing entry, the offense of obtaining money by false pretenses was complete.—State v. Milroy, Wash., 174 Pac. 10.

37. **Guaranty**—Evidence.—Under their contract of guaranty, using the expression "in the event said titles are not found merchantable and good," defendants held liable only if the titles were in fact not merchantable and good, not having guaranteed they would be satisfactory to plaintiff.—Sutton, Steele & Steele Mfg., Mill. & Min. Co. v. McCulloch, Colo., 174 Pac. 302.

38. **Habeas Corpus**—Waiver.—The right to five days' notice and right to be taken before the nearest justice, given by Vehicle Act, § 22, subd. (c), as amended by St. 1917, p. 404, to persons arrested for speeding, were rights which could be waived, which if denied by justice's court, was mere error, correctible on appeal, but not reviewable, under habeas corpus.—Ex parte Turk, Cal., 174 Pac. 100.

39. **Highways**—Negligence.—Where plaintiff, driving an automobile along a county road, was injured by running into a hole therein, he was not entitled to recover, since his injury did not result from any active wrongdoing by defendant,

a public corporation.—*Buckalew v. Board of Chosen Freeholders of Middlesex County, N. J.*, 104 Atl. 308.

40. **Husband and Wife**—Consideration.—Where a son in good faith gave his mother an account due him from his father, and the father, to pay the account conveyed realty and personally to the wife, the deed was supported by a valuable consideration.—*Yates v. Bank of Ringgold, Ga.*, 96 S. E. 427.

41. **Indemnity**—Municipal Corporation.—A city against which a pedestrian recovered judgment for injuries due to defective sidewalk would not be entitled to reimbursement from defendants, joint tort-feasors, to whom city granted tunnel franchise, binding grantees to pay any judgment rendered against city by reason of negligent or defective construction, maintenance, and operation of tunnel, if city contributed to injury by construction of sidewalk or by permitting defect to exist for an unreasonable length of time.—*City of Seattle v. Great Northern Ry. Co.*, Wash., 174 Pac. 4.

42. **Infants**—Rescission.—Where a minor purchased an automobile, but rescinded the contract, he was chargeable with the value of the benefits received, including the pleasure derived from the use of the car, if the manner in which he used it was the reasonable thing for a boy in his station of life to do.—*Wooldridge v. Lavoie, N. H.*, 104 Atl. 346.

43. **Insurance**—Accident.—Under an insurance policy providing that, if insured should become totally and permanently disabled, he was to receive a fixed monthly payment until amount of policy was paid, the obligation of the insurer became fixed, definite, and demandable when the insured became totally and permanently disabled, and, upon the breach of the contract of insurance by the insurer's liquidation, the insurer was liable for the full amount of the policy, reduced to its present cash value as of the date of the liquidation order.—*Wright v. Fuller, Ga.*, 96 S. E. 433.

44. **Contract**—Where agent of an insurance company attached a rider to policy, so as to cover merchandise while in a dwelling house, and subsequently, without knowledge of insured, attached another rider wherein conditions were different, the policy as first issued constituted a binding contract, which could not be changed without insured's knowledge.—*Liverpool & London & Globe Ins. Co. v. McLaughlin, Okla.*, 174 Pac. 248.

45. **Evidence**—In action on fire insurance policy, evidence that plaintiff called up defendant's agents and was told that they would send an adjuster to see him, that a man came to plaintiff and said he had been sent by defendant's agents and was their adjuster, is prima facie evidence that such man was defendant's adjuster.—*Grossman v. American Ins. Co., Mo.*, 204 S. W. 947.

46. **Warranties**—Application for reinstatement of lapsed life policy, whereby insured warrants certain things, enters into and modifies the reinstated policy, though the application for insurance and original policy declared his statements representations and not warranties, in the absence of fraud.—*Davidson v. Security Life Ins. Co. of America, Ore.*, 174 Pac. 154.

47. **Landlord and Tenant**—Arrears of Rents.—Where the lease did not prohibit an assignment, but provided that the contract should bind the lessee and his assigns, and, prior to the accrual of any rents alleged to be due the lessee assigned the lease to a third person, the landlord in unlawful detainer could not recover the arrears of rents from the original lessee, since they are recoverable only from the person guilty of the wrongful detention.—*Chase v. Peters, Cal.*, 174 Pac. 116.

48. **Landlord's Lien**—An affidavit that a tenant was gathering the crop and putting it out of sight and forbidding the landlord from entering upon the premises and told the landlord that he was going to leave the premises, was not made on information and belief, and warranted the clerk of court in issuing the warrant in a proceeding to foreclose a landlord's lien, under Civ. Code, 1912, § 4168.—*Faust v. Bonnett, S. C.*, 96 S. E. 489.

49. **Libel and Slander**—Punitive Damages.—Where libelous matter was such that malice would be presumed from its publication, instruction precluding punitive damages unless the sending of the letters was actuated by ill will, was properly refused.—*Cotton Lumber Co. v. La Crosse Lumber Co., Mo.*, 204 S. W. 957.

50. **Licenses**—Corporation to Practice Architecture.—St. 1901, p. 641, § 5, making it a misdemeanor to practice architecture without a certificate, applies to persons only, and not to corporations, and does not preclude a corporation from doing an architectural business and engaging in the selling of plans and specifications where plans so sold are prepared by certified architects.—*Binford v. Boyd, Cal.*, 174 Pac. 56.

51. **Master and Servant**—Assumption of Risk.—A switchman does not assume the risk of injury from being thrown from the top of a freight car by an impact in making a coupling so violent as to constitute negligence.—*Lancette v. Great Northern Ry. Co., Minn.*, 168 N. W. 634.

52. **Course of Employment**—A transfer truck driver, whose hours were uncertain and who had no regular lunch hour, who had loaded his truck and left it, as customary, in the street adjacent to the office during the noon hour, while waiting for the freight depot to open, and who in obeying instructions to go get the truck and go to the depot, and while crossing the street, was struck and killed by an automobile, received an injury "arising out of and in the course of his employment."—*Burton Auto Transfer Co. v. Industrial Accident Commission of California, Cal.*, 174 Pac. 72.

53. **Course of Employment**—Where, when injured workman reported to representative of employer, neither he nor representative thought wound required medical attention, but later condition became worse, so that medical treatment was necessary, injury arose "out of and in course of employment," within Workmen's Compensation Act, and not from his own willful or negligent failure to care for his wound.—*Hall v. J. La Courciere Co., Conn.*, 104 Atl. 348.

54. **Obvious Danger**—In a miner's action for injury while riding on an empty car, the act of riding in such car at foreman's direction could not, as a matter of law, be held to involve obvious danger.—*Montevallo Mining Co. v. Underwood, Ala.*, 79 So. 453.

55. **Respondent Superior**—Where the servant, returning in an automobile from delivering goods, intending to stop on his way to the place of business at his home for lunch, struck and killed a pedestrian, it could not be said, as a matter of law, that a deviation of a few blocks from the direct route to the place of business was a departure from the master's service, relieving the master from liability for the tort.—*Schrayner v. Bishop & Lynes, Conn.*, 104 Atl. 349.

56. **Monopolies**—Restraint of Trade.—It is no defense to prosecution for conspiracy in restraint of trade entered into by members of association of shippers of certain potatoes that there might be other shippers who would not be affected by the association's regulations, for in a prosecution under anti-trust laws court must take business situation as it is found.—*United States v. King, U. S. D. C.*, 250 Fed. 908.

57. **Mortgages**—Breach of Contract.—Where land contract expressly gave the purchaser the right of possession pending examination of the title, etc., and the purchaser, to secure its performance, gave a deed of trust on other land, such security, on breach of the purchaser's contract, could be subjected to satisfaction of the purchaser's damage and waste while in possession.—*Runnells v. Pruitt, Tex.*, 204 S. W. 1017.

58. **Collateral Security**—Where, while note and recorded mortgage made by wife to her husband were held by plaintiff before maturity as collateral security for note of husband and wife, defendants, discounting note of husband and wife, took another mortgage on the land, relying on recorded satisfaction by husband of the prior mortgage and his statement that it was paid, without demanding of him possession of the mortgage or making inquiry as to its whereabouts, their mortgage was subordinate to the one held by plaintiff.—*Union Nat. Bank of Columbia v. Cook, S. C.*, 96 S. E. 484.

59. **Municipal Corporations—Defective Street.**—There being testimony showing that plaintiff pedestrian was in the exercise of due care, that the manhole had become smooth and that other pedestrians had fallen on it, it was for the jury to say whether the crossing was reasonably safe for persons exercising ordinary care and prudence.—*Smith v. City of Spokane, Wash.*, 174 Pac. 2.

60. **Rule of Highway.**—Under Highway Law N. Y., § 332, the driver of an overtaken vehicle which is on the wrong side of the road is bound to the exercise of greater care, and if an accident occurs the presumption is against him.—*Borden's Condensed Milk Co. v. Mosby, U. S. C. C. A.*, 250 Fed. 839.

61. **Signals and Warnings.**—Whether or not a motorcar was lighted at the time it ran down plaintiff was competent evidence on the question of the reasonable sufficiency of signals and warnings at night.—*White Swan Laundry Co. v. Wehrhan, Aja.*, 79 So. 479.

62. **Speed Limit.**—Where defendant automobile driver cut the corner in turning from one street to another at a speed exceeding 15 miles an hour after dark, jury was justified in finding that he was negligent, although he was not driving in excess of speed limit fixed by ordinance.—*Opitz v. Schenck, Cal.*, 174 Pac. 46.

63. **Nuisance—Ordinance.**—The fact that a city is given authority by law to establish and maintain a sanitary system for the community, and that a dump pile is a part thereof, does not prevent the placing and maintaining of the dump from constituting a private nuisance.—*City of Selma v. Jones, Ala.*, 79 So. 476.

64. **Parent and Child—Custody.**—When the wife by divorce decree was awarded the custody of the minor children with no provision for their support by him, the husband was not subject to prosecution under Pen. Code, § 270, for failure to provide for such children.—*Ex parte Perry, Cal.*, 174 Pac. 105.

65. **Tort by Child.**—A parent is not liable for the torts of his child, even when driving an automobile belonging to the parent, solely on the ground of relationship; but the liability, if any, must rest in the relation of agency or service.—*Warren v. Norguard, Wash.*, 174 Pac. 7.

66. **Principal and Agent—Estoppel.**—In an agent's action on a contract of employment for the sale of calculating machines, providing for forfeiture if he did not sell 50 machines the first year, where defendants repudiated the contract 2½ months after it had been executed, they were estopped to claim forfeiture for nonsale of the requisite number of machines.—*Ersikine v. Marchant, Cal.*, 174 Pac. 74.

67. **Railroads—Logging Railroad.**—In view of Civ. Code 1912, § 3098, providing that the phrase "railroads and railways" shall be construed to mean all railways operated by steam, an ordinary corporation chartered under general laws, which operates a logging railroad, comes within section 3226, as a railroad corporation responsible for damages by fire.—*Crawford v. Mullins Lumber Co., S. C.*, 96 S. E. 494.

68. **Right of Way.**—Where a person enters upon a railroad company's right of way as a trespasser and proceeds along that right of way until he reaches a highway crossing and then attempts to cross the railroad tracks on the highway and is injured, he is subject to the common-law duty of looking and listening, and, if guilty of contributory negligence, is not entitled to recover damages.—*James v. Delaware, L. & W. R. Co., N. J.*, 104 Atl. 323.

69. **Station Grounds.**—Station grounds, prima facie, include all of the right of way enclosed between the switch and the cattle guard on either side of the platform, with the switch and side tracks, unless they are shown to be unreasonable in extent.—*Dickinson v. Stewart, Okla.*, 174 Pac. 233.

70. **Receivers—Appointment.**—The appointment of a receiver to take charge of the business of the lessee does not have the effect in law of changing or annulling contracts made by the lessee with the lessor before the receiver's appointment.—*St. Louis & S. F. R. Co. v. Ravia Granite Ballast Co., Okla.*, 174 Pac. 252.

71. **Sales—Cancellation of Contract.**—Provision in contract for sale of motorcars to dealer for resale, whereby seller reserved right to re-appportion territory, if in its opinion dealer was not properly promoting sales, was designed only to secure to seller proper effort on part of dealer, and did not warrant cancellation for other reasons.—*Northwest Auto Co. v. Harmon, U. S. C. C. A.*, 250 Fed. 832.

72. **Option.**—A contract for the sale of fertilizer material to be imported from mines in Germany, reciting that it was "understood that in case of war \* \* \* then the seller has permission to cancel his contract," did not refer to any war anywhere, but to a war either in this country or in Germany, and gave the seller an absolute option to cancel the contract in case of such war.—*Capital Fertilizer Co. v. Ashcraft-Wilkinson Co., Ala.*, 79 So. 484.

73. **Title.**—Where a purchaser bought the entire wheat crop of a seller at fixed price per bushel regardless of grade, except 400 bushels of no specified grade reserved for seed, the title passed at time of the execution of the contract.—*Sikes v. Freeman, Mo.*, 204 S. W. 948.

74. **Specific Performance—Evidence.**—Because of hardship to defendant, specific performance of a contract to buy stock was not granted against buyer, a farmer, who, being unfamiliar with business methods, had waited until after making contract before applying for a loan on the stock to enable him to make cash payment, and had been unable to secure it; part of the consideration being the buyer's farm, his only means of livelihood, and stock having greatly depreciated in value since the date of the contract.—*Bartley v. Lindabury, N. J.*, 104 Atl. 333.

75. **Trusts—Life Estate.**—A deed conveying property to trustees for grantor's brothers and sisters and their descendants who should be dead at grantor's death, with power to trustees to then distribute remainder, reserving a life estate to grantor, created a trust estate.—*Whiddon v. Whiddon, Ga.*, 96 S. E. 431.

76. **Vendor and Purchaser—Recording Deed.**—Where a purchaser puts his deed on record, he need not watch the record to learn whether other deeds by his grantor or judgments against him are subsequently docketed or recorded; and the same is true of the grantee of a trust deed.—*McClanahan's Admr v. Norfolk & W. Ry. Co., Va.*, 96 S. E. 453.

77. **Wills—Distribution.**—Where a devisee brought action against executors and heirs at law, obtaining a judgment that he was the owner of lands by virtue of an unrecorded deed from the testator, and presented a copy of the judgment to the county court upon final distribution, he elected to take against the will and the other devisee was entitled to receive the bequests to such electing devisee.—*In re Perrost's Estate, S. D.*, 168 N. W. 630.

78. **Life Estate.**—Where will, after devising land to testator's son's children, provided that son should have "benefit and use of said tract of land \* \* \* during his natural life," and that such right was to continue despite death of children prior to son's death, but that son should not sell or mortgage any of the property, and that, upon son's failure to pay taxes, prevent waste, and keep buildings insured, property was to revert to testator's estate, son was given life estate in property, and not mere right of use and occupancy.—*Barkhoefer v. Barkhoefer, Mo.*, 204 S. W. 906.

79. **Life Tenant.**—Where a will giving decedent's son an income for life, with remainder to his lawful issue, provided that if, when he became 40 years old, he should in the opinion of the executrix, as trustee, be competent to manage his own affairs, of which she was to be sole judge, she should convey the capital of the property to him, her determination of the question was final, if the judgment exercised by her was sound and honest.—*Turnure v. Turnure, N. J.*, 104 Atl. 293.

80. **Testamentary Capacity.**—Where a will was contested for incapacity of maker, an instruction that disability to make a will arises "from the want of capacity or want of perfect liberty of action" was not misleading, because the maker of the will was a cripple and unable to walk without assistance.—*Holland v. Bell, Ga.*, 96 S. E. 419.